No. 82-1682

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ABDEEN M. JABARA,

Petitioner,

v.

WILLIAM H. WEBSTER, et al.,

Respondents.

REPLY OF PETITIONER TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Pursuant to Rule 22.5 of the Rules of this Court, petitioner respectfully submits this reply to the brief for respondents in opposition to the instant petition for a writ of certiorari.

ARGUMENT

In their brief in opposition to the instant petition, respondents advance several

arguments for denying review of the judgment below. Avoiding rather than squarely confronting the important issues presented, the arguments advanced by respondents serve only to strengthen the case for review.

1. Respondents claim that, in light of the enactment of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-11 ("FISA"), "[t]he Fourth Amendment question presented by petitioner is . . . likely to have little, if any, practical significance beyond this case and [therefore] does not merit this Court's review." Government's Brief ("G.B.") 7. But the Sixth Circuit's judgment sweeps far beyond the circumstances in which a court order might be required under FISA for interception of overseas communications. On its face, the opinion below invites the government to ignore the teachings of Katz v. United States not only with respect to electronic surveillance of overseas

communications "for foreign intelligence purposes." G.B. 7. Just as critically, the opinion below affords a blank check for warrantless surveillance of purely domestic communications as well -- so long as the technology employed is sufficiently advanced. For according to the court below, it is the fact that a government agency has the technical capability to monitor the channels through which unintelligible signals carrying private communications are sent that renders lawful the warrantless interception and examination of particular communications sent over those channels. See Petition at 22-23, 33-35. And, needless to say, the opinion below undermines the Fourth Amendment rationale for FISA itself. The Fourth Amendment issue in this case, therefore, has broad and far-reaching significance indeed, and clearly warrants review.

2. Asserting that "petitioner conceded below that the NSA's interception and acquisition of his communications were lawful," G.B. 8, respondents maintain that the NSA's subsequent transfer of petitioner's communications to the FBI therefore plainly required no warrant. But petitioner nowhere made any such concession -- either below or in this Court -- and any suggestion in the opinion of the court below that he did is simply incorrect. What petitioner has argued throughout is that the warrant requirement came into play at the moment when government officials first acquired access to the contents of his private communications -- not when the contents of such communications were disseminated by the NSA to the FBI. Whether government officials first acquired such access when petitioner's private communications were electronically intercepted, see Katz v. United States, or at some subsequent

point, see Walter v. United States; cf. Smith v. Maryland, is immaterial. See Petition at 16-17 & n.27, 27-29, 32-33.[1] Nor does this case present any issue of "military [or] state secrets," G.B. 9, for the critical

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1 The Sixth Circuit's assertion that petitioner did not "contend . . . that the interception [of his private overseas communications] by the NSA violated his Fourth Amendment rights," 691 F.2d at 277, Pet. App. 93, quoted in G.B. 5, is radically misleading. Petitioner acknowledged below that, whatever the lawfulness of the NSA's warrantless monitoring of the channels over which his private communications were carried, no violation of his privacy occurred so long as the contents of his private communications remained "unnoticed and unread." Brief for Plaintiff-Appellee in Sixth Circuit at 22. But petitioner has strenuously protested throughout that his Fourth Amendment rights were violated when government officials, acting without a warrant, acquired access to the contents of his private communications -- that is, when the contents of his communications became subject to their "'analysis, summary, examination or dissemination.'" Id., quoting Partial Judgment (Pet. App. 87). See Brief for Plaintiff-Appellee in Sixth Circuit at 7, 20-22; Plaintiff-Appellee's Petition for Rehearing and Suggestion of Rehearing En Banc at 10-13.

question is not how or when but whether the warrantless interception and examination of petitioner's communications occurred. As the district court observed, respondents below admitted petitioner's allegation with respect to that "threshold and ultimate issue." 476 F. Supp. at 578, Pet. App. 63. See Petition at 13 n.18. The fact of such conceded interception and examination establishes the injury of which petitioner complains and fully supports his prayer for relief.

3. Notwithstanding their attempt to dismiss the Privacy Act issue as "poorly focused and highly abstract . . . at this point," G.B. 11, and notwithstanding their reference to the "interlocutory posture of this aspect of the case," id., respondents have offered no justification for denying review. First, there is nothing "interlocutory" about the disposition of the Privacy Act issue by the court below. If

the judgment below is reversed, the district court's injunction would become operative -- subject to any further direction from this Court on remand. If, on the other hand, the judgment below is sustained, the issue on remand would be the applicability in this case of the subsection (e)(7) standard embraced by the court below, not its correctness. The correctness of that standard is an issue petitioner may be barred from relitigating on remand as res judicata. Second, notwithstanding the self-contradictory remarks of Rep. Ichord quoted by respondents at G.B. 11-12, the legislative history of subsection (e)(7) unmistakably demonstrates that a federal agency may not, merely by waving the talisman of "national security," be allowed to maintain records describing an individual's entirely lawful exercise of First Amendment rights.

See Petition at 38-45.[2] Finally, although respondents attempt to distinguish Clarkson v. IRS on the ground that the investigation there was not "a national security investigation," G.B. 13, nothing in Clarkson -- or in the opinion of the court below -- even hints that the applicability of subsection (e)(7)'s ban on the maintenance of records describing an individual's exercise of First Amendment rights turns on whether the investigation is proclaimed to involve "national security." Instead, Clarkson holds that the maintenance of such records is barred absent some violation-oriented investigative focus; the

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2 Any suggestion that the construction of subsection (e)(7) advanced by petitioner would somehow bar "background investigations of prospective federal employees," G.B. 12 & n.14, is wholly without merit. The view suggested by respondents would permit government agencies, without limit, to compile information about how every American exercises First Amendment rights on the theory that anybody may someday be a candidate for federal employment.

court below, to the contrary, construed subsection (e)(7) to permit the maintenance of such records absent any such investigative focus. A conflict between two federal circuit courts could hardly be clearer.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the petition, review should be granted.

Respectfully submitted,

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